JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Thu Nov 3 07:39:54 2011
//caseml/case/mlj/03-SDB_NO_2_185985_126936_01

SDB Damansara Sdn Bhd v Datuk Bandar Kuala Lumpur (No 2)

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2–25–37 OF 2011
ROHANA YUSUF J
3 MAY 2011

Civil Procedure — Res judicata — Similarity of issues — First application for judicial review dismissed for not praying for leave and for relief sought therein being made out of time — Second identical application filed praying for leave and extension of time — Whether res judicata applied — Whether second application attempt to circumvent court's order on first application — Whether application for extension of time under O 53 r 3(6) of the Rules of the High Court 1980 must be made inter partes — Whether good reason shown to warrant extension of time

The applicant applied for leave and for extension of time to file an application for judicial review under O 53 of the Rules of the High Court 1980 ('RHC'). The review sought was of a decision by the respondent under the Federal Territory (Planning) Act 1982 to scale down the number of bungalow units in a new project from 21 to 16. The applicant had previously filed an application for judicial review ('the original application') of the same decision of the respondent but it was dismissed on 31 January 2011 for not having a prayer for leave. Leave was a pre-requisite under O 53 r 3(1) of the RHC before an application for judicial review could be made. The original application was also dismissed on the ground the order for mandamus applied for therein was made out of time. No appeal was filed against the decision dismissing the original application. The applicant said the original application was filed within 40 days — as required by O 53 r 3(6) of the RHC — from the date the grounds for the application first arose on 12 October 2010, being the date the applicant was informed of the respondent's decision in a press briefing. The applicant said the original application was dismissed purely on technical or procedural grounds. In the circumstances, it said, the extension of time should be granted.

Held, dismissing the application with costs:

(1) The application was an attempt to circumvent the order issued by the court in the original application. Instead of appealing on that order, the applicant resorted to filing a fresh application to remedy the defects of the original application. This was a 'back-door' approach to try the same issue instead of appealing the same to the superior court (see para 5).

(2) If the application were allowed there would be no end to any litigation.

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Thu Nov 3 07:39:54 2011
//caseml/case/mlj/03-SDB_NO_2_185985_126936_01

The court was not at liberty to deal with an application that was identical to or substantially the same as the original application as the court would apply the doctrine of res judicata to preserve the effect of the order granted on 31 January 2011 (see paras 5 & 4).

(3) The application for extension of time had no merit. Time for the application ran from the date of the impugned decision and could not be salvaged by the wrong application in the original application. The original application was substantially defective and was as good as no application. Time could not be suspended simply because the original application was defective (see para 13).

(4) No explanation was given for the delay of four months from October 2010 to the date the instant application was filed on 14 February 2011. No good reason was offered, as was required under O 53 r 3(6) of the RHC, for the application for extension of time to be considered (see para 14).

(5) An application for extension of time under O 53 of the RHC must be made inter partes (see para 9).

[Bahasa Malaysia summary

Pemohon memohon untuk kebenaran dan lanjutan masa untuk memfailkan permohonan semakan kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Semakan yang dipohon adalah keputusan oleh responden di bawah Akta (Perancangan) Wilayah Persekutuan 1982 untuk mengurangkan nombor unit banglo di dalam projek daripada 21 kepada 16. Pemohon telah sebelum ini memfailkan permohonan untuk semakan kehakiman ('permohonan asal') keputusan yang sama oleh responden tetapi ia ditolak pada 31 Januari 2011 kerana tidak mempunyai permohonan untuk kebenaran. Kebenaran adalah wajib di bawah A 53 k 3(1) KMT sebelum permohonan untuk semakan kehakiman boleh dibuat. Permohonan asal juga ditolak atas alasan perintah mandamus yang dipohon dibuat luar masa. Tiada rayuan difailkan terhadap keputusan yang menolak permohonan asal. Pemohon menyatakan permohonan asal difailkan dalam amsa 40 hari – seperti yang dikehendaki oleh A 53 k 3(6) KMT — dari tarikh alasan-alasan untuk permohonan pertama kali bangkit pada 12 Oktober 2010, iaitu tarikh pemohon diberitahu mengenai keputusan responden di taklimat akhbar. Pemohon menyatakan permohonan asal ditolak semata-mata atas alasan-alasan teknikal atau prosedur. Dalam keadaan ini, ia menyatakan, pelanjutan masa patut dibenarkan.

Diputuskan, menolak permohonan dengan kos:

(1) Permohonan adalah cubaan untuk memintas perintah yang dikeluarkan oleh mahkamah dalam permohonan asal. Pemohon sepatutnya merayu atas perintah tersebut tetapi memilih untuk memfailkan permohonan

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Thu Nov 3 07:39:54 2011
//caseml/case/mlj/03-SDB_NO_2_185985_126936_01

baru bagi remedi kecacatan permohonan asal. Ini adalah pendekatan 'back-door' untuk merayu atas isu yang sama dan bukan merayu kepada mahkamah tinggi (lihat perenggan 5).

(2) Jika permohonan dibenarkan, tidak ada kesudahan untuk mana-mana litigasi. Mahkamah tidak bebas untuk berurusan dengan permohonan yang sama atau secara substansial sama seperti permohonan asal kerana mahkamah akan mengaplikasi doktrin res judicata untuk mengekalkan kesan perintah yang diberikan pada 31 Januari 2011 (lihat perenggan 5 & 4).

(3) Permohonan untuk pelanjutan masa tidak mempunyai merit. Masa untuk permohonan bermula dari tarikh keputusan yang dikatakan tersebut dan tidak boleh diselamatkan oleh permohonan yang salah di dalam permohonan asal. Permohonan asal adalah secara substansial cacat dan seperti tidak ada permohonan. Masa tidak boleh diberhentikan hanya kerana permohonan asal adalah cacat (lihat perenggan 13).

(4) Tiada penjelasan diberikan untuk kelewatan empat bulan dari Oktober 2010 hingga ke tarikh permohonan ini difailkan pada 14 Februari 2011. Tiada alasan yang kukuh dikemukakan, seperti yang dikehendaki di bawah A 53 k 3(6) KMT, untuk permohonan pelanjutan masa dipertimbangkan (lihat perenggan 14).

(5) Permohonan untuk pelanjutan masa di bawah A 53 KMT mesti dibuat inter partes (lihat perenggan 9).]

Notes

For cases on res judicata in general, see 7(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6675–6808.

Cases referred to

Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor [2008] 6 MLJ 704, HC (folld)

Government of Malaysia v Dato' Chong Kok Lim [1973] 2 MLJ 74 (refd)

Lembah Mayang Sdn Bhd & 2 Ors v The Director of Forestry [2004] 1 LNS 323 (refd)

Mersing Omnibus Co Sdn Bhd v The Minister of Labour & Manpower & Anor [2008] CLJ (Rep) 266, FC (refd)

President Hotel Sdn Bhd v Datuk Bandar Kuala Lumpur & Anor (Crest Trading Sdn Bhd, intervener) [1995] 4 MLJ 517, HC (refd)

Legislation referred to

Federal Territory (Planning) Act 1982
Rules of the High Court 1980 O 53, O 53 rr 3(1), (6)

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Thu Nov 3 07:39:54 2011
//caseml/case/mlj/03-SDB_NO_2_185985_126936_01

Harpal Singh (Lua Ai Siew and Daphne Khew with him) (Soo Thien Ming & Nashrah) for the applicant.
R Abraham (Janice Leo with him) (Shook Lin & Bok) for the respondent.

Rohana Yusuf J:

[1] In encl 1 the applicant sought an extension of time and leave in an application for a judicial review made under O 53 of the Rules of the High Court 1980 ('RHC'). The judicial review application was in relation to a decision made under the Federal Territory (Planning) Act 1982 by the respondent to scale down the project for construction of bungalows.

BACKGROUND FACTS

[2] Prior to this application, on 19 November 2011 the applicant vide application in Suit No R2–25–499 of 2010 ('the original application') had filed an application for a judicial review of the same decision before this court. The original application was dismissed by this court on 31 January 2011 on the grounds that it was defective as it was made without any prayer for leave and the order for mandamus sought therein in relation to the stop work order issued by the respondent was made out of time. There was no appeal filed against that decision.

[3] In this application, the applicant sought for extension of time and leave to apply for a judicial review of the same impugned decision as the one in the original application in Suit No R2–25–499 of 2010.

[4] This court has deliberated on the requirement for leave and the necessity to comply with time period stipulated in O 53 in the original application. The original application had been dismissed and this court is not at liberty to deal with an application that is identical to or substantially the same as the original application as this court will apply the doctrine of res judicata to preserve the effect of the order granted on the 31 January 2011. In the *Government of Malaysia v Dato' Chong Kok Lim* [1973] 2 MLJ 74 it was held that a decision given by a court at any stage on a particular matter or issue is binding on it at a later stage, in the same suit or in the subsequent suit. Parties are also not entitled to raise for a second time in the same suit, an issue that has already been determined either expressly or by implication.

[5] In my view, this application is an attempt to circumvent the order issued by this court in the original application. Instead of appealing on that order, the applicant resorted to filing a fresh application to remedy the defects of the original application. This is a 'back-door' approach to try the same issue,

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Thu Nov 3 07:39:54 2011
//caseml/case/mlj/03-SDB_NO_2_185985_126936_01

instead of appealing the same to the superior court. When this court held that the original application was defective for its failure to comply with mandatory requirement for leave under O 53 of the RHC, the very same application is now brought before this court, albeit with a prayer for leave and an application for an extension of time. If this application is allowed, in my view, then there will be no end to any litigation.

[6] Even if it can be argued that res judicata has not set in, an application for extension of time of 40 days under O 53 r 3(6) must be made with good reason. Before looking at the reasons offered by the applicant there is another issue that was raised by the learned counsel for the applicant. That issue being, whether an application for extension of time is to be made ex parte. She contended that the application for extension of time should be heard ex parte, and therefore urged this court not to consider the objection taken by learned counsel for the respondent on this issue. For one thing, the application had been served on the respondent. I am therefore unable to see how then the respondent's objection should merit consideration of this court.

[7] Learned counsel for the respondent cited in authority the High Court's decision in *President Hotel Sdn Bhd v Datuk Bandar Kuala Lumpur & Anor (crest Trading Sdn Bhd, intervener)* [1995] 4 MLJ 517 to contend that an application for extension of time under O 53 must be made inter parte. I agree with that decision though it was based on the earlier rule, which lays down the requirement of six- week limitation. The High Court in that case referred to the Supreme Court Practice 1979 Vol 1 p 831 to hold that the application of time must be made inter parte. The practice was applied so that the respondent may be heard weather it is a fit case to extend time.

[8] Learned counsel for the applicant however urged this court to disregard the case of *President Hotel* but to follow another High Court's decision in *Lembah Mayang Sdn Bhd & 2 Anor v The Director of Forestry* [2004] 1 LNS 323. Learned counsel contended that following the decision of *Lembah Mayang*, since there is no objection raised on behalf of the attorney general's chambers in this application, I should allow the application for an extension of time. This is because according to her, the attorney general represents the interest of the public and since there is no objection raised by the attorney general, I should allow the application for an extension of time.

[9] First, I am not able to find any part of judgment of the High Court in *Lembah Mayang* that suggests, if there is no objection by the attorney general, ipso facto, the applicant's application for extension of time should be allowed. The High Court in *Lembah Mayang* did in fact acknowledged the requirement

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Thu Nov 3 07:39:54 2011
//caseml/case/mlj/03-SDB_NO_2_185985_126936_01

of inter parte application for an extension of time to be necessary. I therefore hold that application for extension of time under O 53 must be made inter partes.

[10] Under O 53 r 3(6), a good reason is necessary for the court to exercise its discretion in favour of any extension of time. The burden must be on the applicant to put up a good reason, to justify the extension of time.

[11] Learned applicant's counsel submitted that the applicant had in its affidavit disclosed sufficient grounds to warrant an extension of time. The applicant's grounds for extension of time in this application was that, it had filed the original application within 40 days from the date the grounds of application first arose on 12 October 2010. In its explanation, it states that the cause of action arose on 12 October 2010, which is the date the applicant was informed of the respondent's decision in a press briefing. The decision of the respondent was to scale down the number of units of bungalow to be constructed on the Damansara 21 Project from 21 units to 16.

[12] The applicant contended that on 31 January 2011 the original application was dismissed purely on technical or procedural grounds as there was no prayer for leave in the application for judicial review (Form 111A) filed by the applicant. As soon as possible thereafter, the applicant made this application on 14 February 2011. These are the accounts by the applicant on the reasons for delay.

[13] On this point, I agree with the submission of learned counsel for the respondent that, the application does not merit an extension of time. On the first proposition, it is clear that the relevant time period is not to be taken to be the date when the original application was made. That original application was substantially defective. It is as good as no application. Time for the application begins to run from the date of the impugned decision and cannot be salvaged by the wrong application in the original application. In other words, the application before this court today cannot be deemed to have been filed in the original application or at the time, the original application was filed. Time cannot be suspended simply because the original application was defective. This is based on the principle on legal maxim *nullus commodum capare potest de injuria sua propori*, that no man can take advantage of his own wrong. The date therefore must be when the impugned decision of the respondent was made.

[14] The two relevant dates for the purpose of computing time are:

(a) 21 October 2010 — the date contended to be the date the decision of the respondent was communicated, and

(b) 11 December 2008 — the date of the stop work order.

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Thu Nov 3 07:39:54 2011
//caseml/case/mlj/03-SDB_NO_2_185985_126936_01

No good explanation or any explanation for that matter was shown for the delay of four months; from then to this application dated 14 February 2011. There is no good reason offered to this court as required under O 53 r 3(6) for the application for an extension of time to be considered.

[15] I do not see any need to emphasise further on the importance of complying with time as I have done so in my previous decision in the original application. Suffice to say, time determines whether this court has jurisdiction to entertain this application and hence it is no mere technical requirement as suggested by learned counsel of the applicant. To this end, I am guided by the decisions of the superior courts in *Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor* [2008] 6 MLJ 704, which had quoted the Federal Court decision in *Mersing Omnibus Co Sdn Bhd v The Minister of Labour & Manpower & Anor* [2008] CLJ (Rep) 266.

[16] For all the reasons stated above, I hereby dismiss the application of the applicant in encl 1 in prayer (1) with costs of RM10,000.

Application dismissed with costs.

Reported by Ashok Kumar